United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

621

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,899

THOMAS W. ROBINSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court
for the District of Columbia

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293-2525

August 20, 1969

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STATEMENT OF THE ISSUES

1. Whether a confession of an incarcerated mental patient induced by police and other pressures and by the St. Elizabeth doctor treating him was voluntary and should have gone to the jury?

2. When the confession was made under police and other pressures, first to the doctor, second to the hospital administrator, third to the police, whether in a capital case it was plain error to admit the third confession without showing the jury the prior circumstances which induced it?

3. Whether the patient's right to counsel was violated when no counsel was provided for his defense until after his arraignment and when the prosecution postponed the arraignment and first presentment of the indictment to the accused six months after return of the indictment to the Court?

4. When the patient was in St. Elizabeth's after a verdict of not guilty by reason of insanity and his new offense closely paralleled his earlier offenses, whether it was plain error to submit the patient's criminal responsibility to the jury without instructing the jury on the presumption of mental illness resulting from his earlier acquittal?

This case has not previously been before this Court.

REFERENCES TO RULINGS

After a preliminary hearing, the trial Judge found no basis to exclude Mr. Robinson's confession. This ruling and accompanying findings are set forth at Tr. 307.

Following the verdict, Mr. Robinson moved for acquittal or a new trial on grounds that his confession was not voluntary and his right to counsel had been violated. Docket No. 29. This motion was denied on March 14, 1969. Docket No. 30. The same day the trial Court adjudged Mr. Robinson convicted of second degree murder, sentenced him to "fifteen (15) years to no more than life" and recommended psychiatric treatment. Docket No. 31.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,899

Thomas W. Robinson,

Appellant,

v.

United States of America,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Mr. Robinson was convicted in the United States District Court for the District of Columbia of murder in the second degree in violation of 22 D. C. Code Section 2403. He was sentenced to fifteen years to no more than life with psychiatric treatment recommended. The order was entered March 14, 1969. The appeal was docketed in this Court on April 3, 1969. This Court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C.A. Section 1291.

On May 30, 1967, about mid-morning, Mrs. Astair Adams, employed at St. Elizabeth's Hospital, was brutally killed in a dry creek bed about 400 feet from a path which led through a brief wooded area from Alabama Avenue onto the Hospital

grounds. Tr. 390, 401-402, 413-416, 480 a, 480 c, 568-569. She had been first strangled, then dragged from near the path to the creek bed, and there her head crushed with two stone blocks of 40 and 30 pounds weight. Tr. 415-417, 535.

Police were called to the site early that afternoon. Tr. 390, 525-526. Their investigation turned at once to questioning patients at St. Elizabeth's. Tr. 16-18, 27-29.

Mr. Robinson was first admitted to St. Elizabeth's on November 18, 1964. Tr. 88, 493. At that time he was charged with an assault upon a woman at Fort Dupont Park. Tr. 89-90, 646-647. He was committed to St. Elizabeth's for mental examination. Mr. Robinson was then 25 years of age and since 16 had been almost continuously in custody on one or another offense, many directed against women. Tr. 199, 204-207, 638-641. The hospital staff conference, held January 14, 1965, concluded that Mr. Robinson suffered from a schizophrenic reaction, chronic undifferentiated type, and was competent for trial. Tr. 90-91, 610. At the trial a verdict of not guilty by reason of insanity was entered and Mr. Robinson was readmitted to St. Elizabeth's Hospital on March 25, 1965. Tr. 90-91, 493.

Mr. Robinson was placed in maximum security at the John Howard Pavilion. After nearly eight months of observation, the hospital diagnosis of his condition was changed to "emotionally unstable personality". Tr. 91-92, 128-129, 235-236, 494-496, 515-517, 610, 612-615. His condition seemingly improved under

the controlled environment of the John Howard Pavilion. Tr. 91-92, 497, 510, 513, 615, 617, 619-620, 647-648, 723, 725. In February 1967 he was transferred out of the John Howard Pavilion to the Cruvant Division of the Hospital where he was given progressively greater freedom. Tr. 92, 132, 493. Sometime prior to May 30, 1967, he was granted ground privileges. Tr. 92-93. The St. Elizabeth grounds are not fully enclosed and he could and did leave the grounds.

Six days after the Adams homicide, on June 5, 1967, a park police officer reported to the homicide squad that there was a close parallel between the Fort Dupont Park assaults and the Adams homicide. Tr. 19. Three police officers that day questioned Mr. Robinson. Tr. 20-21, 25-26. The next day he was returned to the maximum security of the John Howard Pavilion. The case against Mr. Robinson developed rapidly. He was questioned. Scratch marks on both arms were photographed. His clothing and shoes were examined. Tr. 21-50, 133-138.

On June 10, 1967, Mr. Robinson told his story to Dr. Blum. Tr. 227-228. Dr. Blum had been treating Mr. Robinson in group psychotherapy sessions twice a week, and briefly for individual sessions, since May 1966. Tr. 224-225, 235, 634-635, 693. Mr. Robinson asked Dr. Blum what to do and Dr. Blum advised that he tell his story to Dr. Owens, the clinical director in charge of the John Howard Pavilion. Tr. 80, 228, 492. Dr. Blum arranged this meeting for Monday, June 12. Tr. 229. On June 12

Mr. Robinson in the morning told his story to Dr. Owens in the presence of Dr. Blum and Dr. Schwartz, the doctor in charge of his treatment. Tr. 98-99, 100-101. In the afternoon at Dr. Owens' suggestion he repeated his story to the police. Tr. 101, 60-61, 531-537.[1/]

1/ Sgt. Wilson reported the confession to the jury:

"He stated that he had been going to visit his sister and he had gone to 10th and Alabama Avenue to catch a bus, and while he was waiting for the bus, he decided his sister would not be there. So he started back to the hospital. He said he was walking along the path that led off of Alabama Avenue towards the hospital, and there was a young lady going in the same direction as he was.

"He stated that he spoke to her and she tossed her head at him and didn't make any reply. He stated that he said, 'You are like all women; you ought to be dead.'

"At that time she slapped him and he grabbed her. He stated that he started down this path down into the woods. That at one time he fell and she spit at him. He said that he started to grab her around the throat and choke her and that he dragged her down to where a stream was in the woods and put her on the stream bed. There was a rock close by. That he picked it up and dropped it on her head. He stated that he started to leave and as he started to leave, she made a move. He said he saw another larger piece of rock, concrete, some distance away, and that there was a blanket hanging on the tree. He stated that he took the blanket and dragged the rock back and something told him to drop it on her head again.

"At that time he stated that he left and went through a tunnel to the Geriatrics Building." Tr. 535.

Mr. Robinson remained in maximum security at the John Howard Pavilion. An indictment issued against him for first degree murder on July 13, 1967, Docket No. 1, was returned to the Court on August 17, 1967, and was first presented to Mr. Robinson at his arraignment six months later, February 19, 1968. Docket No. 2. He entered a plea of not guilty. No counsel was appointed for his defense until February 20, 1968, four days after arraignment. Docket No. 3.

Additional facts relevant to Mr. Robinson's appeal points appear in the Argument.

SUMMARY OF ARGUMENT

The homicide resulted from "ground privileges" granted by St. Elizabeth's to a patient placed in the hospital by the court for safekeeping.

At first blush this is a case of the court and the people against the hospital. Now Mr. Robinson stands convicted. He contends that this would not have happened had his rights under the Fifth and Sixth Amendments been adequately guarded or had the jury been properly instructed on the presumption that he had a mental disease.

The jury was shown the last of Mr. Robinson's three confessions, the confession to the police. At trial and by later motion for acquittal, Mr. Robinson contended that this confession to the police was not voluntary. It was the fruit of his immediately preceding confession to Dr. Owens. His confession to Dr. Owens

was obtained without a Miranda warning and was otherwise improperly induced. If this contention is sustained, his constitutional right not to be compelled to be a witness against himself has been violated and his conviction must be reversed.

Assuming that the admittance of the confession was not error, Mr. Robinson still had a right to a fair trial by the jury to determine whether or not the confession was voluntary beyond a reasonable doubt. The trial court had a duty to provide such a trial. By allowing the confession to go to the jury without the circumstances which the prosecution at the preliminary hearing had shown were relevant to its voluntariness, Mr. Robinson was deprived of a fair trial by jury on this issue. The failure to show the jury the circumstances that induced the third confession prejudiced Mr. Robinson's constitutional right in a capital case where his conviction rested almost exclusively on the confession. This was plain error requiring reversal.

After trial Mr. Robinson moved for acquittal on the ground that an affirmative duty existed to provide him with counsel at an early stage in the prosecution. The trial had shown that Mr. Robinson's insanity defense had been seriously prejudiced by the prosecution's use of the confession made to the police, by the lack of any impartial examination made of Mr. Robinson's mental condition promptly after the homicide, by the failure to

have discovered early in the defense the hospital change of Mr. Robinson's diagnosis to a "personality disorder", and by the eight months delay after the indictment before appointment of counsel. Had counsel been appointed for Mr. Robinson early in the prosecution's case, these prejudices would have been avoided. The prosecution's case against Mr. Robinson reached a critical stage before Mr. Robinson confessed to Dr. Evens. Mr. Robinson at that time had a right to the assistance of counsel. In his circumstances an adequate safeguarding of that right required that counsel be appointed for him. Because his right to counsel was not adequately safeguarded, the Court's jurisdiction is vitiated and the conviction must be reversed.

The Court's charge to the jury stated the usual presumption that every man is without mental disease until evidence to the contrary is shown. The Court failed to instruct the jury that Mr. Robinson after his acquittal by reason of insanity was presumed insane and that the law also presumes that his insanity continues until a cure or other change in his condition is shown. At the time of the homicide, Mr. Robinson was still in the hospital. His earlier offense closely paralleled the new offense. The failure to instruct the jury on the presumption of insanity was plain error requiring reversal.

ARGUMENT

I. THE CONFESSION TO THE POLICE WAS NOT VOLUNTARY

(Relevant pages of the transcript are. 16-52, 53-63, 67-219, 222-274, 307-308, 491-500, 531-551, 570-734, 737-741.)

1. Circumstances relevant to the confession. The voluntariness of Mr. Robinson's confession to the police should be decided in the light of all relevant circumstances. Davis v. State of North Carolina, 384 U. S. 737, 741-742, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895, 898 (1966); Blackburn v. Alabama, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); Payne v. Arkansas, 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958); McAffee v. United States, 70 U. S. App. D. C. 142, 105 F. 2d 21 (1939); Scarbeck v. United States, 115 U. S. App. D. C. 135, 317 F. 2d 546 (1962), cert. denied 374 U. S. 856, 83 S. Ct. 1897, 10 L. Ed. 2d 1077, rehearing denied 375 U. S. 874, 84 S. Ct. 35, 11 L. Ed. 2d 105.

(a) Custody. From March 25, 1965, until February 7, 1967, Mr. Robinson was confined in maximum security in the John Howard Pavilion after a verdict of not guilty by reason of insanity. On February 7, 1967, he was transferred to the Cruvant Division where on and before May 30, 1967, he had ground privileges.

On June 5, 1967, six days after the Adams homicide, Mr. Robinson was interrogated by three police officers. Tr. 16-51.

The next day he was returned to the maximum security of the John Howard Pavilion as a suspect in the police investigation. Tr. 499. He was still in maximum security five days later when he made his confession to the police.

(b) Interrogation and search. The police interrogated Mr. Robinson on June 5 because his 1964 offenses were said to closely parallel the Adams homicide. Tr. 19-20, 29-30. He was questioned morning and afternoon about these earlier offenses, about the Adams homicide and about his whereabouts on May 30, 1967. He was tricked into two significant admissions, that he was in the neighborhood of the homicide on the morning of May 30, that he was carrying a package. Tr. 21-22, 24, 34-35, 43-45, 48. The police were looking for Mrs. Adams' handbag. Tr. 35. Also on June 5, the police noticed and questioned Mr. Robinson about scratch marks on his arms and examined his clothes in his clothes locker. Tr. 22-23, 25, 46, 50.

On June 7, Mr. Robinson was questioned by Dr. Owens. Tr. 134-139. Dr. Owens had earlier talked with the police about the Robinson case. The police by that time had taken photographs of the marks on Mr. Robinson's arms. Dr. Owens examined these marks and concluded that they "very definitely appear to be caused by fingernails". Tr. 137. Dr. Owens proposed that Mr. Robinson take a sodium amytal test. Tr. 137. Mr. Robinson declined. Dr. Owens told Mr. Robinson "exactly what the situation was" and that Mr. Robinson would be held in

the John Howard Pavilion until the homicide was cleared up. Tr. 135-136, 149.

Over the following days and before Mr. Robinson confessed, the police were arranging to take items of Mr. Robinson's clothing out of the hospital for examination and Mr. Robinson knew about this. Tr. 140-149.

(c) Mental disease. Mr. Robinson had a disease which when activated caused bizarre and hostile acts toward women. Tr. 591-592, 611, 619-620 638-645. For more than a year, he had been in group and individual psychotherapy with Dr. Blum. Shortly before the homicide, he had become involved with a woman outside St. Elizabeth's and this involvement had activated his disease. Tr. 226, 643, 732-734, 739-741. According to Dr. Blum he was at that time evidencing agitation. Dr. Blum had scheduled a therapy meeting for May 30. For the first time Mr. Robinson failed to attend and Dr. Blum thought this significant.

(d) Three confessions. On Saturday, June 10, Dr. Blum received a telephone call that Mr. Robinson wanted to talk to him. Tr. 227-228. He went to the hospital and called Mr. Robinson to his office. He did this as a therapist. Tr. 634-636. At their meeting Mr. Robinson told Dr. Blum what had happened on the date of the Adams homicide. Tr. 227-228. Mr. Robinson was very broken up, very upset, crying profusely [illegible]. Tr. 228, 242-243.

Mr. Robinson asked what he should do and Dr. Blum stated: "I think the best thing to do is to make a clean breast of it and to talk to Dr. Owens, the clinical director, at this time as well as Dr. Schwartz, the ward administrator." Tr. 228. Mr. Robinson agreed and Dr. Blum arranged the meeting for Monday morning, June 12. Tr. 229.

At the June 12 morning meeting with Dr. Owens, according to Dr. Blum, Mr. Robinson came out with his story before any advice or warning was given him regarding his right to silence or his right to an attorney. Tr. 230-231, 238. However, Dr. Owens prior to that meeting had consulted the United States Attorney in charge of the case and had been told to inform Mr. Robinson that he had a right to an attorney and that he need not say anything. Tr. 96-97. Dr. Owens testified that he did what the United States Attorney told him to do. Tr. 97-99.

After Mr. Robinson had told his story to Dr. Owens, Dr. Owens asked him if he would tell the police. Tr. 100-101, 148-149. Mr. Robinson said he would and Dr. Owens arranged the police meeting for that afternoon. Tr. 56, 70, 74, 77, 102-103, 107-108.

There is no evidence that Mr. Robinson spoke with anyone during the approximate three hour interval between the two meetings. Mr. Robinson testified that at about 12:30 before the meeting with the police he had a librium pill. Tr. 203. This was a sedative and there are some other indications that he

may have been subject to medication when he confessed to the police. Tr. 62-63, 75-83, 108-109, 158, 196-197, 514, 546, 594. Mr. Robinson repeated his story to the police about 2:30 that afternoon. Tr. 61-62, 81, 160-162, 536-535. Then the police asked questions to check his knowledge of the homicide against details known to the police. Tr. 62-63, 81, 536-537.

(e) Inducement. Dr. Blum believed that, in his treatment of Mr. Robinson, he had won Mr. Robinson's trust and confidence. Tr. 228. He believed that when Mr. Robinson confessed to him, Mr. Robinson would do what he told him to do. Tr. 233-235, 269, 274. Mr. Robinson testified he told his story to Dr. Owens because Dr. Blum told him to. Tr. 200, 214-215. This testimony was not contradicted and was confirmed by substantial evidence that Mr. Robinson was a cooperative, even a model patient. Tr. 93, 237-238, 511, 519-520, 617, 619-620, 699, 701, 706-707, 726, 729-730.

(f) Miranda warning. The police read a Miranda warning to Mr. Robinson at the commencement of the June 12 afternoon meeting. Tr. 60-61, 76, 159, 194, 532-533. Mr. Robinson indicated he understood the warning and thereupon immediately talked to the police without exercising any of his rights. Tr. 61-62, 67-69, 80, 85, 153, 160-163.

The only earlier warnings to Mr. Robinson about his right to counsel and to silence were made by Dr. Owens during the

June 12 morning meeting or later. Tr. 104-107, 152-153, 201, 216, 230-233, 246-250, 269, 503. At some time that morning Dr. Owens had advised Mr. Robinson that if he wanted an attorney he could have one. Whether Dr. Owens that morning informed Mr. Robinson that what he said might be used against him in court is unclear. Tr. 146-147, 195-196, 215. Mr. Robinson did not have counsel and was not told that he should have counsel. Tr. 274.

2. Involuntariness of the confession. The underlying vice in the confession cases is the involuntary 'voluntariness' which until recently we have somehow come to think adequate to justify depriving a man of a deep-rooted constitutional privilege. We have been ready to let a man sign away his life under circumstances in which we would not recognize his conveyance of a subdivided lot. Sooner or later this was bound to end." Crime and Confession, Arthur T. Sutherland, Jr., 79 Harvard Law Review 21 at 37 (1965).

The end is at hand. Recent decisions emphasize that no man shall be convicted of a crime on his confession unless that confession has been shown beyond a reasonable doubt to have been given in the exercise of his free judgment, with awareness of his right to silence, and without coercion or improper inducement. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Mallory v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

The Miranda decision requires that a confession made when in custody and under police pressures must be carefully guarded. The same pressures preventing exercise of a free judgment and breaking the will to silence are present in this case. Mr. Robinson was returned to the maximum security of the John Howard Pavilion because he was suspect. Quickly he became the prime suspect. His communication with friends, attorneys, doctors were all subject to his keepers control. All Mr. Robinson's clothing and personal effects were in the hands of his keepers. All the privileges that he might expect to have for an indefinite time into the future were also largely in their hands.

From the morning of June 5 until his confession to the police on the afternoon of June 12, Mr. Robinson was subjected to a quickening pressure. On June 5 the police learned that Mr. Robinson's prior offenses were activated by insane hatred for women and they believed the same to be true of the Adams homicide. Tr. 49. In swift progression, they caught Mr. Robinson concealing his whereabouts, concealing the package. They observed the scratch marks on his arms. They examined his clothing. They returned him to maximum security. They photographed his arms. The medical administrator questioned Mr. Robinson and proposed a sodium amytal test. At the time of the confessions, arrangements were being made to take items of his clothing out of the hospital. These pressures were telling. Garrity v. New Jersey, 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562

(1953); Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948 (1954), Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

Although Mr. Robinson was competent, Tr. 94, 107-108, his mental disease and the treatment he was receiving for that disease weakened his ability to resist the forces impelling him to talk. Tr. 245, 257. At the time of the police investigation, Mr. Robinson had been in an agitated state for some weeks. When he met with Dr. Blum on June 10, he was "bawling like a baby". Tr. 242, 270-271. Green v. United States, 128 U. S. App. D. C. 408, 389 F. 2d 949 (1967).

For two and a half years Mr. Robinson had been a cooperative patient. He had come to look to the doctors at the hospital for help. Not only did he understand that they considered him to be mentally sick, he also understood that they were helping him to get well and expected him to accept their guidance.

Under these pressures, in these surroundings and with this background, it is not surprising that Mr. Robinson finally turned for help to Dr. Blum. He came to Dr. Blum as his doctor. He had cause to believe that he could talk to Dr. Blum in confidence. His talk to Dr. Blum did not evidence any decision on his part to confess to his accusers. He talked to get his doctor's help. He asked what he should do.

At this point Dr. Blum delivered the blow that induced Mr. Robinson to confess. Spano v. New York, 360 U. S. 315,

79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959). The direct and immediate result of that blow was the confession to Dr. Owens. When Mr. Robinson confessed to Dr. Owens, he was confessing to the man who had put him back in maximum security as a suspect, to the man who had questioned him and had proposed the sodium amytal test. Tr. 84. Mr. Robinson's talk to Dr. Owens was his confession to his accusers. The repeat performance for the police at Dr. Owens suggestion followed automatically. Tr. 231. It had no significance to Mr. Robinson. He had already confessed to the prosecution. Tr. 70, 74, 77-78, 150-159, 188, 191-192.

The Miranda rule requires that when the case for the prosecution reaches its accusatory stage and the accused is in custody and subjected to police pressure, the accused shall be told that he has a right to remain silent, that anything he says may be used against him, that he has a right to an attorney and, if he cannot afford an attorney, an attorney will be provided for him. This Miranda warning should have been given Mr. Robinson before his talk with Dr. Owens. It was not given at that time. Mr. Robinson's talk with Dr. Owens was not adequately safeguarded. The confession to Dr. Owens could not be used to convict Mr. Robinson. Miranda v. Arizona, supra.

The confession to the police is not on any better footing. Nothing of significance intervened. The confession to Dr. Owens led directly to the confession to the police. The first being

inadmissible, so is the second. Killough v. United States, 114 U. S. App. D. C. 303, 315 F. 2d 241 (1963), Goldsmith v. United States, 107 U. S. App. D. C. 305, 277 F. 2d 335 (1960), cert. denied 364 U. S. 863, 81 S. Ct. 109, 5 L. Ed. 2d 86 (1960); Jackson v. United States, 119 U. S. App. D. C. 100, 337 F. 2d 136 (1963), cert. denied 380 U. S. 935, 85 S. Ct. 944, 13 L. Ed. 2d 822; Harling v. United States, 111 U. S. App. D. C. 174, 295 F. 2d 161 (1961); Darwin v. Connecticut, 391 U. S. 346, 88 S. Ct. 1488, 20 L. Ed. 2d 630 (1968); Harrison v. United States, 392 U. S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968).

Additionally, and entirely apart from the Miranda rule, the confessions to Dr. Owens and to the police were both not only the products of the blow struck by Dr. Blum, they were also the products of the accumulation of pressures which had brought Mr. Robinson bawling into Dr. Blum's office. Tr. 241-244. Mr. Robinson's confession to the police was not the product of an essentially free and unconstrained choice, it was not made freely, voluntarily and without compulsion or inducement of any sort. To the contrary, his original will to silence had been overborne. Green v. United States, 128 U. S. App. D. C. 408, 389 F. 2d 949, at 952 (1967); Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Haynes v. State of Washington, 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Lynumm v. State of Illinois, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). If ever there was a case of

involuntary 'voluntariness', Mr. Robinson's assent to "make a clean breast of it" is such a case.

The confession made by Mr. Robinson to the police was not voluntary. The conviction must be reversed. Miranda v. Arizona, 384 U. S. 436, at 464, footnote 33, 86 S. Ct. 1602, at 1620, 16 L. Ed. 2d 694, at 717-718 (1966); Ziang Sung Wan v. United States, 266 U. S. 1, at 14-15, 45 S. Ct. 1, at 3-4, 69 L. Ed. 131, at 148 (1942).

II. ADMISSION OF THE CONFESSION WITHOUT SHOWING THE CIRCUMSTANCES RELEVANT TO ITS VOLUNTARINESS WAS PLAIN ERROR

(Relevant pages of the transcript are those cited for Part I of the Argument and: 8-10, 290-291, 463-470, 475-478, 942-944, 960-961, 968-970.)

1. Jury trial of voluntariness. The finding of the trial Judge which allowed Mr. Robinson's confession to go to the jury was not a finding that his confession was voluntary beyond a reasonable doubt. The trial Judge decided only that there was no basis for excluding the confession from the jury. Tr. 307-308. The confession went to the jury subject to the instruction that the jury must find the confession voluntary beyond a reasonable doubt, and, if not, must disregard the confession. Tr. 942-944, 960-961, 968-970. The ultimate and essential finding was for the jury to make. Clifton v. United States, 125 U. S. App. D. C. 257, 371 F. 2d 354 (1966), cert. denied 386 U. S. 995, 87 S. Ct. 1312, 18 L. Ed. 2d 341; Hutcheson v. United States, 122 U. S.

App. D. C. 51, 351 F. 2d 748 (1965); Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

When the Court admitted the confession, the Court had a duty, whether or not requested by either party, to instruct the jury to disregard the confession unless the jury was satisfied on all the evidence that the confession was voluntary beyond a reasonable doubt. Clifton v. United States, supra. To the same end the Court had a duty not to admit Mr. Robinson's confession for jury consideration unless the circumstances relevant to determining its voluntariness were shown to the jury.2/

2. Circumstances relevant to voluntariness were not shown to the jury. The jury was not shown the existence of the two confessions which preceded the confession to the police. The jury was shown only indirectly and incompletely the history of Mr. Robinson's incarceration at St. Elizabeth's. Tr. 89-91, 493-494, 972. The jury was not shown the circumstances under which Mr. Robinson on June 6, 1967, was returned to the John Howard Pavilion. The jury was not shown the police interrogation

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2/ But for Clifton v. United States, supra, Mr. Robinson might contend that the trial court erred by admitting the confession without first determining its voluntariness "beyond a reasonable doubt". The postponement of this determination to the jury trial is the root of the duty here ennunciated.

which preceded the confessions nor that the police had examined and at the time of the confessions was arranging to take Mr. Robinson's clothing and shoes. Testimony of Sgt. Preston before jury, Tr. 463--467, compare with preliminary hearing: Sgt. Preston Tr. 17-32. The jury was not told that the police had photographed the marks on Mr. Robinson's arms nor that Dr. Owens had examined these marks and had questioned Mr. Robinson and had proposed that Mr. Robinson take a sodium amptal test. The jury was not shown that the police investigation first focused on Mr. Robinson because of the close parallel between his earlier offenses and the Adams homicide. Most important, not knowing about the first and second confessions, the jury knew nothing of the ties linking the three confessions and heard nothing of Dr. Blum's prescription "to make a clean breast of it".

The prosecution told the Court that what took place before Dr. Blum and Dr. Owens on June 10 and 12 was relevant to the voluntariness of the third confession. Tr. 291. Most of the circumstances relevant to voluntariness were shown at the preliminary hearing by the prosecution through its witnesses. The only significant exceptions were those circumstances within the peculiar knowledge of Dr. Blum called by the defendant. Having chosen to rest Mr. Robinson's conviction on the confession to the police, and having shown to the trial court that this confession was linked to the two

earlier confessions and was the product of in custody pressures which broke down Mr. Robinson's initial silence, the prosecution should not have been allowed to better its case for voluntariness before the jury by withholding these circumstances from the jury. Darwin v. Connecticut, supra, see opinion of Mr. Justice Harlan concurring at 531.

This Court assigns to the jury the finding of voluntariness beyond a reasonable doubt. Under this rule, to admit this confession without showing the jury the circumstances necessary to determine its voluntariness was constitutional error. Clifton v. United States, supra, see opinion of Circuit Judge Leventhal concurring in result. Had the Court excluded the confession, the Court would have been responsible for taking reasonable steps to see that the excluded confession did not influence the verdict. Meres v. United States, U.S.C.C.A. 10th Cir. 383 F. 2d 805 (1967). Having admitted the evidence, the Court was responsible for taking reasonable steps to provide the jury the opportunity to determine fairly its voluntariness.

3. Gross prejudice. Mr. Robinson was on trial for first degree murder. The prosecution rested its case for identifying Mr. Robinson with the homicide almost exclusively on the

confession to the police.[3/] Tr. S. The trial Judge knew this and knew that the confession to the police arose in circumstances, some of which at the very least, cast doubt on the voluntariness of that confession.

Nevertheless, the jury was shown a confession volunteered by Mr. Robinson to the police after Mr. Robinson had been given the Miranda warning and before the police had commenced any interrogation. Tr. 499-508, 514, 531-537, 545-547. The jury was shown that Mr. Robinson had asked to talk with the police. Practically all the evidence submitted to the jury showed Mr. Robinson wanting to make the confession, volunteering the confession, and doing so apparently fully advised of his rights and absent any coercion or outside inducement.

Mr. Robinson's counsel in closing argument made no effort to persuade the jury that the confession to the police was not voluntary. The case for finding the confession not voluntary as presented to the jury was a hopeless one. However, after trial Mr. Robinson moved for acquittal asserting again that his confession to the police was not voluntary.

Mr. Robinson at and after trial made a general protest to the admission of his confession to the police. Its admission

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3/ In addition to the confession, the prosecution showed the marks on Mr. Robinson's arms through testimony of Sgt. Preston, Tr. 464-470, and that Mr. Robinson was seen on Alabama Avenue about three quarters of a block from the path at about 11 A. M. May 30, 1967, Tr. 477-478.

without the inducing circumstances was "a serious and harmful error of constitutional proportions involving the admission of harmful evidence in a capital case." Harrison v. United States, 128 U. S. App. D. C. 245, at 256 and cases cited in footnotes 53, 54 and 55, 387 F. 2d 203, at 214 (1967). Rule 52(b) Federal Rules Criminal Procedure, 18 U.S.C.A. It constituted plain error and requires reversal.

III. DEFENDANT'S RIGHT TO COUNSEL WAS VIOLATED

(Relevant pages of transcript are those cited for Parts I and II of the Argument and: 757-815, 819-676 and documents, Docket Nos. 1, 2, 3, 29 and 30.)

1. Chronology. The prosecution focused its case on Mr. Robinson on Monday, June 5, 1967, a week after the homicide. Within a day or two he became the prime suspect. By the week's end, he sought help from Dr. Blum. The next Monday, June 12, without assistance of counsel, he confessed to Dr. Owens. Five weeks later, July 13, 1967, an indictment issued for first degree murder. Docket No. 1. The indictment was returned to the Court on August 17, 1967. Docket No. 1. At all times Mr. Robinson was in custody. Nevertheless, no indictment was presented to him until his arraignment on February 16, 1968. Docket No. 2. At the arraignment, still without counsel, he entered a plea of not guilty. Docket No. 2. He had no assistance of counsel until counsel was appointed for him by the Court four days after the arraignment. Docket No. 3.

This was more than six months after the return of the indictment and more than eight months after the prosecution's case had focused upon him.

Mr. Robinson after trial moved for acquittal on the ground that an affirmative duty existed to provide him with counsel at an early stage in the prosecution. Docket No. 29. His motion was denied. Docket No. 30.

2. Particular need for counsel. Any person accused of first degree murder needs counsel. 18 U.S.C.A. Section 3005. Mr. Robinson had particular need for counsel which required that exceptional care be taken to prevent an infringement of his right to counsel.

(a) Mental health. By the time the prosecution's case centered on Mr. Robinson, and continuously thereafter, the prosecution had cause to know that it was accusing Mr. Robinson of an offense causely related to the disease for which Mr. Robinson was being treated by psychotherapy in a mental hospital. Also the prosecution knew that Mr. Robinson had been adjudicated not guilty by reason of insanity less than three years earlier for similar offenses attributed to the same disease. Despite Mr. Robinson's competence to stand trial, he had a special need for counsel because of the probability that he was suffering from a mental disease at the time of

the homicide and because of the probability that a determination of criminal responsibility for the new offense would affect his prior acquittal.4/

(b) Pressures opposing an insanity defense. Mr. Robinson had been granted ground privileges by the administrators and doctors at the St. Elizabeth's Hospital. They had granted the ground privileges deliberately to test Mr. Robinson's capacity to return to life outside the hospital. Tr. 131-132, 237-238, 498-499, 619-620, 698, 700-703. The prosecution's investigation showed this test to have been a fatal mistake. A finding that Mr. Robinson was not mentally ill at the time of the homicide would help to explain that mistake. The hospital administration had an interest which conflicted with Mr. Robinson's insanity defense. While Mr. Robinson remained a patient incarcerated at St. Elizabeth's, this conflict caused Mr. Robinson a particular need for counsel.

(c) Custody and psychiatric treatment. Mr. Robinson had been in custody and under psychiatric treatment at St. Elizabeth's for more than two years. He was a cooperative patient and had adapted well to the hospital's controlled environment. He had come to trust his doctors. Tr. 143. He had reason to believe

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4/ In the prior case, St. Elizabeth's Hospital has recommended an unconditional release. The Court has postponed consideration of that recommendation, waiting the result of this appeal. United States District Court for the District of Columbia, Criminal Docket #813-64.

that his cure and his return to freedom rested in their hands and in the hands of the hospital administrators. Not only was he in custody but also his capacity to exercise an independent judgment was extremely limited. Both were cause for taking particular care to guard Mr. Robinson against an unconsidered or ill considered waiver of his right to counsel.

3. Critical stages in the prosecution. The prosecution's case against Mr. Robinson became accusatory on June 6, 1967, when he was returned to the tight security of the John Howard Pavilion and his arms photographed and clothing examined. From that time forward Mr. Robinson had a constitutional right to the assistance of counsel at each critical stage in the prosecution. Miranda v. Arizona, supra; Escobedo v. Illinois, supra. Powell v. Alabama, 270 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). The prosecution passed several critical stages before Mr. Robinson had counsel.

(a) Talk with Dr. Owens. Dr. Owens received the message that Mr. Robinson wanted to tell him something on the weekend of June 10-11, 1967. Dr. Owens believed he knew what Mr. Robinson was going to tell him and got instructions from the United States Attorney. Tr. 146. The United States Attorney told him to be sure he told Mr. Robinson that he had a right to counsel and that Dr. Owens would have counsel appointed for him if he wanted counsel. Tr. 95-97.

When Dr. Owens met with Mr. Robinson on the morning of June 12, he talked with Mr. Robinson, not as his doctor, but as administrator of the John Howard Pavilion. Tr. 515. He had earlier questioned Mr. Robinson about the homicide. This further meeting with Mr. Robinson was to hear what Mr. Robinson now had to say about the homicide. Dr. Owens expected to hear a confession. This was a critical stage in the prosecution and, in the circumstances peculiar to this case, Mr. Robinson could not be expected to appraise intelligently the consequences of his confession. Miranda v. Arizona, supra; Escobedo v. Illinois, supra; Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), Beatty v. United States, U.S.C.A. 5th Circuit, 377 F. 2d 131, reversed 389 U. S. 45, 88 S. Ct. 234, 19 L. Ed. 2d 48 (1967).

(b) Indictment. The prosecution obtained the indictment for first degree murder on July 13, 1967. Docket No. 1. Tr. 190-191, 193. Mr. Robinson received no notice of the indictment. The prosecution returned that indictment to the Court on August 17, 1967, still without notice to Mr. Robinson. Although Mr. Robinson testified that he first learned he was charged with something in December 1967, the record shows no presentation of the indictment to Mr. Robinson until it was read to him on February 16, 1968. Tr. 217-218.

The indictment marked a change in the label that the prosecution was attaching to Mr. Robinson's disease, a change

from a mental disease to a not-mental disease. Tr. 612-614. But despite this change of label, Mr. Robinson was held in maximum security at the John Howard Pavilion with no arrest on the new charge. Tr. 31-32. For this purpose, his disease still bore the 'mental disease' label. The indictment for first degree murder without arrest, without notice prior to arraignment, without any appointment of counsel for Mr. Robinson enabled the prosecution at its convenience to postpone commencement of Mr. Robinson's defense indefinitely. The indictment was a second critical stage in the prosecution's case.

(c) Return of indictment. The indictment was returned to the Court on August 16, 1967. The time provided by Court rule for arraignment passed with no arraignment. Local Rules of the United States District Court for the District of Columbia, Rule 87 (a) and (b). Mr. Robinson was at all times available for arraignment. The arraignment was not had until February 16, 1968. This delay of six months for which no cause was shown marks a third critical stage in the prosecution.

(d) Arraignment. Mr. Robinson was arraigned for first degree murder on February 16, 1968. At the arraignment he had his first view of the indictment. He pled not guilty. In a capital case, an arraignment is a critical stage in the prosecution regardless of the plea entered by the accused. Hamilton v. Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); Anderson v. United States, 122 U. S. App. D. C. 277, 352 F. 2d 945 (1965).

4. Prejudice from lack of counsel. Mr. Robinson's defense was prejudiced by (1) his confession to the police, (2) the lack of any prompt and impartial examination of Mr. Robinson's mental condition, (3) the failure to discover early the hospital change of diagnosis of Mr. Robinson's disease and (4) the lack of a speedy trial. Each of these prejudicial developments occurred after commencement of the accusatory stage of the prosecution's case and while Mr. Robinson was in custody and without counsel. Each would not have occurred had counsel been appointed and had the appointed counsel performed his duty with reasonable skill and conscientiousness. Assistance of counsel was indispensable to protect Mr. Robinson from each of these prejudicial developments and thereby was indispensable to his right to a fair trail. United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

In the absence of counsel for the defense, the prosecution obtained three confessions. The prosecution was enabled to use the confession which it considered most damaging to the defense. To have used the confession made to Dr. Blum, the prosecution would have called Dr. Blum as a witness and Dr. Blum was of the opinion that Mr. Robinson was mentally ill at the time of the homicide and that his mental illness was causely related to the homicide. Tr. 636-638. To have used either confession made to the doctors would have tended to relate the homicide to Mr. Robinson's mental condition.

Dr. Schwartz, who also held the opinion that Mr. Robinson was mentally ill at the time of the homicide and that the homicide was related to this illness, Tr. 519-597, 624-629, was present, along with Dr. Blum, when Mr. Robinson confessed to Dr. Owens. If that confession had been used, the testimony of Doctor Schwartz and Doctor Blum, as well as Doctor Owens, would have been relevant to show the confession. The confessions originated in meetings with the doctors. The prosecution chose to conceal this. No doctor was present at the third confession. Tr. 157, 259.

The examinations of Mr. Robinson's mental condition were made 13 and 17 months after the homicide. Tr. 703, 770. During the intervening period, Mr. Robinson was held in the closely confined environment of the John Howard Pavilion where, at least outwardly, his condition improved. This same improvement had occurred during his earlier confinement at the John Howard Pavilion. During the early stages of the prosecution, there was no medical opinion holding that Mr. Robinson's disease, whatever its label might be, was not related to the homicide. Fourteen months later the prosecution obtained an opinion of one doctor that Mr. Robinson's disease was cured before May 30, 1967. Dr. Platkin, Tr. 827-834, 861-863. It is most unlikely that any such medical opinion would have resulted from an examination of Mr. Robinson made in June 1967, instead of June 1968. Moreover, had a mental examination been made promptly,

Mr. Robinson's defense would have been alerted to the need for an examination by doctors outside St. Elizabeth's Hospital.

Had this mental examination been made promptly, the hospital change of diagnosis of Mr. Robinson's disease would have become known to Mr. Robinson's defense. The hospital had changed its diagnosis from a schizophrenic to a personality disorder. By this change Mr. Robinson's disease came to fall into an area where medical opinion is divided. Tr. 129, 496, 774. Overholser v. O'Beirne, 112 U. S. App. D. C. 267, at 271, footnote 10, 302 F. 2d 852, at 856 (1961), Overholser v. Leach, 103 U. S. App. D. C. 289, 257 F. 2d 667 (1958), cert. denied 359 U. S. 1013, 79 S. Ct. 1152, 3 L. Ed. 2d 1030. In these circumstances it was important to Mr. Robinson's defense to obtain testimony from that branch of medical opinion which considered the personality disorder which afflicted Mr. Robinson a mental disease. Mr. Robinson at his trial did not have an independent expert from this branch of medical opinion to testify in his defense.5/ This disadvantage may properly be attributed to the failure to have discovered this key issue earlier.

The prosecution delayed the arraignment for six months after the indictment was returned. No cause for the delay was

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5/ Dr. Harland, the doctor appointed on motion of Mr. Robinson, was of the opposite view and was called by the prosecution to testify against the insanity defense. Tr. 751, 756-757.

shown. In a capital case a delay of this kind without reason and with prejudice to the defense might well be a violation of Fifth Amendment due process and of Sixth Amendment right to a speedy trial. Powell v. United States, 122 U. S. App. D. C. 229, 352 F. 2d 705 (1965); Dockery v. United States, 129 U. S. App. D. C. 243, 393 F. 2d 352 (1968), Hodgepeth v. United States, 125 U. S. App. D. C. 19, 365 F. 2d 952 (1966). In Mr. Robinson's case his constitutional rights to protection against unnecessary prejudicial delay are fused in his right to counsel. Had counsel been appointed for him at an early stage, either the delay would have been avoided or its prejudice to his defense would have been avoided.

Mr. Robinson had a constitutional right to counsel at the lineup on June 12, 1967, before his confession to Dr. Owens. Counsel appointed at that time could have avoided the "potential substantial prejudices" which later developed. United States v. Wade, 388 U. S. 218, at 227, 87 S. Ct. 1926, at 1932, 18 L. Ed. 2d 1149, at 1157 (1967). The failure to have heeded this right deprived the Court of jurisdiction. Harrison v. United States, 128 U. S. App. D. C. 343, at 354 and cases cited in footnote 42, 387 F. 2d 203, at 212 (1967). The conviction must be reversed.

IV. THE JURY CHARGE ON INSANITY WAS PLAIN ERROR

(Relevant pages of transcript are those cited for Parts I, II and III of the argument and 935-971 and the document, Docket No. 31.)

1. The charge to the jury. The Court charged the jury that every man is presumed to be without mental disease until some evidence to the contrary is shown. Tr. 955. Mr. Robinson at the time of the homicide was in St. Elizabeth's after a verdict of not guilty by reason of insanity. This verdict made him an exception to the general rule. Nevertheless, the Court's charge did not state the exception.

The general rule of law is that a person is presumed to be without mental disease until some evidence is adduced to show the contrary. However, this rule does not apply where a person has been adjudicated to have a mental disease. Blunt v. United States, 100 U. S. App. D. C. 255, 244 F. 2d 355 (1957); Gunther v. United States, 94 U. S. App. D. C. 343, 215 F. 2d 493 (1954). Where such an adjudication has occurred, the person's mental disease is presumed to continue until evidence of a cure or other change is shown to upset the presumption of insanity.

Mr. Robinson had been acquitted by reason of insanity. A person so acquitted "will be presumed to be insane". Taylor v. United States, 95 U. S. App. D. C. 373, 379, 222 F. 2d 398, 404 (1955); Orencia v. Overholser, 92 U. S. App. D. C. 205, 163 F.

2d 763 (1947), In re Rosenfield, U. S. D. C. D. C. 157 F. Supp. 11 (1958) remanded on other grounds 104 U. S. App. D. C. 322, 262 F. 2d 34; Sims v. United States, C.C.A. 5th Circuit, 253 F. 2d 909 (1958).

Mr. Robinson was presumed to be insane after his acquittal when he was placed in St. Elizabeth's on March 25, 1965. The law further presumes that his condition continued until cured or changed. In these circumstances the trial Court erred by stating the presumption of sanity without stating that in Mr. Robinson's case, because of his acquittal, he is presumed to have been insane on March 25, 1965, and further that the law presumes that his insanity continued until a cure or other change in his condition is shown.

The offense for which Mr. Robinson was acquitted closely paralleled the new offense. This parallel increases the probability that the condition for which he was earlier acquitted had neither been cured nor changed at the time of the new offense. In Mr. Robinson's case a presumption of insanity at the time of the new offense existed both by reason of his prior acquittal and also by reason of the parallel between the prior offense and the new offense. Not to instruct the jury on any presumption of insanity applying to Mr. Robinson was error.

2. Substantial prejudice. The prosecution's case for criminal responsibility was, at best, marginal. The homicide itself had all the characteristics of madness: bizarre, without

motive or gain of any kind, far out of rational thought or act, even as explained by the doctor for the prosecution. Tr. 871-873. All the expert opinion related the homicide to Mr. Robinson's "personality disorder". The four doctors appearing for the prosecution testified that in their opinion Mr. Robinson's disease was never a mental disease and yet Mr. Robinson had received, for more than two years and was continuing to receive at the time of the trial, psychotherapy treatment in a mental hospital. Only one doctor testified that Mr. Robinson's condition had been cured and this doctor placed the cure after February 1967 and before May 30, 1967, a patently tenuous conclusion. The two doctors who appeared for Mr. Robinson and who testified that his disease was a mental disease were the two doctors who had had far and away the greatest opportunity to know Mr. Robinson's condition. The jury had been instructed that the burden of proof was on the prosecution and that each juror must determine Mr. Robinson criminally responsible beyond a reasonable doubt. The jury reached its decision only after two and one-half days deliberation. The Court in sentencing Mr. Robinson recommended psychiatric treatment.

The jury reached its decision absent any presumption of insanity, either deriving from the prior acquittal or deriving from the parallelism between the prior and new offense. The jury had only an imperfect understanding of both the acquittal and the parallelism. Tr. 972-982. Its decision was reached

without awareness of the presumption and without a unanimous understanding of the facts from which the law drew the presumption. A proper charge to the jury would have removed this prejudice to Mr. Robinson's insanity defense and quite possibly would have resulted in a verdict of not guilty by reason of insanity.

The charge as stated did substantial prejudice to a principal defense in a capital case. It constituted plain error and requires reversal. Rule 52(b) Federal Rules Criminal Procedure, 18 U.S.C.A.

CONCLUSION

The judgment below must be reversed. The case may be remanded for a new trial only if the Court concludes that Mr. Robinson's right to counsel has not been violated.

Respectfully submitted,

David Cobb
Counsel for Appellant
(Appointed by this Court)

August 20, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,899
(Cr. No. 1058-67)

UNITED STATES OF AMERICA, Appellee,

v.

THOMAS W. ROBINSON, Appellant.

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

By decision published December 30, 1970, a division of this court, with one judge dissenting, reversed appellant's conviction for second degree murder, finding that a third confession to the police, the Government's principal trial evidence, was, as were the two prior confessions and an admission, involuntary and therefore inadmissible.

The majority opinion held inter alia that an initial police interview with appellant, a patient at Saint Elizabeths Hospital, in which he made an admission, should have been accompanied by a warning of his rights. It went on to hold that a full confession which appellant initiated five days later to a doctor at the hospital, and then agreed to give to the doctor supervising his unit, were involuntary as occurring

—with mounting investigative pressure——under circumstances more coercive than those under custodial interrogation depicted in Miranda v. Arizona, 384 U.S. 436 (1966). Thus the third confession later to the police, though preceded by full warnings, was irredeemably rendered involuntary by all that had gone before - particularly the initial interview - and consequently it was improperly admitted into evidence.

Factual Background

The disposition of this case by the majority turned principally upon its construction of some record facts. We feel that the dissenting opinion has better set forth the proper factual perspective for viewing the instant case.

Appellant was committed to Saint Elizabeths Hospital in 1965 following a determination of not guilty by reason of insanity on a rape charge. At the time of the instant offense he was in a facility which permitted him ground privileges. On the morning of May 30, 1967, a female employee of the hospital was brutally killed, and her body was found in a creek bed near the hospital grounds. An extensive police investigation was launched. Police officers interviewed many patients who lived in wards near the scene of the crime. During the first week of investigation over one hundred persons had been routinely questioned. Sergeant Preston, who interviewed appellant and

to whom appellant made an admission, had questioned some twenty-seven persons alone before he interviewed appellant. After this week of investigation there were four or five prime suspects, who included the decedent's boy friend and a recently eloped patient from the hospital who had committed a similar crime in the past. Appellant was questioned initially on the morning of June 5, six days after the crime, as a result of a suggestion from a Park Policeman that the modus operandi here appeared to be similar to that in the rape case in which he remembered appellant had been involved and which resulted in the 1965 commitment to the hospital. However, Sergeant Preston did not consider appellant as a serious suspect at that time because other patients had similar backgrounds [1/] and because the doctor supervising appellant's ward had indicated that appellant could not have been out on the hospital grounds on the morning of the crime. The purpose of the interview was stated to appellant, who was calm and spoke freely. No warnings were given. The interview was

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1/ As the dissenting opinion points out, slip op. at 28, Sergeant Preston had somewhat sketchy knowledge of the facts of the 1965 case at the time he interviewed appellant. Moreover, despite the asserted similarity, in the instant case there were no indications of sexual molestation. These circumstances suggest that Sergeant Preston could not have considered appellant as a prime suspect when he embarked upon his initial interview with him.

slightly over a half hour in duration, and half of this time was devoted to discussion of another suspect. It was during this interview, however, that Sergeant Preston observed numerous and lengthy scratches on appellant's arms and "bluffed" appellant by stating that he was seen in the area of the crime on the morning in question, though the officer actually had no basis for this assertion at that time. Appellant made an admission, tending to indicate that he was near the scene at the time in question. He did not admit to any crime and indeed explained the scratches on his arms, saying that they had resulted from hanging a basketball hoop at his girl friend's house. Sergeant Preston's idea of a struggle in which the victim might have scratched her assailant was described as "pure theory," and thus the presence of the scratches was not given serious weight.

After this interview with appellant, the police continued to question other persons. Later in the afternoon of the same day, Sergeant Preston interviewed appellant again-during which time no admission was made—and continued to interview other suspects until he was shortly taken off this particular case.

ARGUMENT

A. The majority holding severely hampers routine police investigation.

The majority opinion indicates that appellant's initial interview constituted custodial interrogation and that appellant was being "interrogated by officers as a suspect in a manner admittedly designed to obtain a confession." Slip op. at 11. This interview, the majority concludes, required as a preface full Miranda warnings, and their absence rendered the admission (which was not introduced into evidence) involuntary. In our view, and as the dissenting opinion properly observes, this holding is inconsistent with Miranda itself and a later decision by this Court, Allen v. United States, 129 U.S. App. D.C. 61, 390 F.2d 476, supp. op., 131 U.S. App. D.C. 358, 404 F.2d 1335 (1968). It is clear that the decision of the Supreme Court in Miranda was "not intended to hamper the traditional function of police officers in investigating crime" or the "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process." 2/ In these instances cautionary warnings

2/ Miranda v. Arizona, supra, 384 U.S. at 477.

are not necessary. They were not necessary in the instant case. The interview with appellant was nothing more than investigation. The police officers, at the time of the interview and admission by appellant, did not consider him a prime suspect or any more serious a suspect than other persons. There is, we maintain, a wholly inadequate basis for the conclusion in the majority opinion that when Sergeant Preston "bluffed" appellant into indicating that he had been near the scene of the crime, "the interrogation had sufficiently focused on appellant" to require warnings. Slip op. at 10 (emphasis added). The officer had indicated there was no basis for his telling appellant that others saw him near the scene of the crime on the morning in question.[3/] This "bluff" on the officer's part cannot serve to convert this initial interview with appellant into "custodial interrogation" requiring the Miranda warnings. It appears to be the sole factor relied on by the majority to support its conclusion that warnings should have been given. In Allen v. United States, supra, this Court

3/ The Government does not condone police trickery as a technique in crime investigation. It was here, however, but one factor to be considered in the total circumstances surrounding this interview.

indicated that no single factor should be decisive in this determination, but that all the circumstances surrounding the interview should be considered, including "the relative routineness" [4/] of the inquiries. 129 U.S. App. D.C. at 63-64, 390 F.2d at 478-479. Significantly here, appellant was not arrested after the first interview or the one that followed later that afternoon because the officer felt that appellant had said nothing upon which an arrest could be based. Moreover, after appellant's interviews the course of the wider investigation did not change, and Sergeant Preston continued to talk to other patients until he was taken off this assignment a few days later.

We strongly suggest that the majority holding would severely and unnecessarily impede the general investigation of crime by requiring warnings under circumstances that were present in the instant case.

4/ We think the relative routineness of an inquiry is a material indicator that the police are still in a stage of investigation. The police talk to too many people in the course of a day to make warnings compulsory every time they inquire into a situation. "Such a requirement would hamper and perhaps demean routine police investigation." 129 U.S. App. D.C. at 64, 390 F.2d at 479.

B. The majority opinion would require warnings to be given before a confession by persons not involved in law enforcement.

The majority indicates that appellant's initial interviews on June 5 were a part of the "investigative pressures then exerting their influence upon him" [5/] and caused him to initiate the first full confession five days later to Dr. Blum, [6/] a psychotherapist at the hospital.

The clearly voluntary nature of the confession is underscored by the fact that appellant requested to see Dr. Blum by having him called at his home on a weekend. Despite Dr. Blum's indications that appellant's confession to him was the result of "some inner turmoil," the majority finds the confession more the result of preceding events such as the police interviews and "trickery," the recommitment to maximum security, and the suggestion two days earlier of a truth-serum test. [7/] However,

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5/ Slip op. at 14.

6/ There was no intervening police interview. On June 6, the day following the initial police interviews related above, appellant was returned to maximum security—not, as the majority indicates, because the investigation had "focused" on him but because it appeared he had been violating ground privileges. On June 7 pictures were taken of appellant's scratches. On June 8 he was offered (but refused) a truth-serum test by Dr. Owens, who believed that appellant, a model patient, was not involved in the crime and could clear himself.

7/ The fact that appellant two days before he was to confess to Dr. Blum refused an offer by Dr. Owen to take a truth-serum test to clear himself would tend to negative the likelihood of any coerciveness.

this conclusion we feel is not anywhere suggested in the record, and certainly not in the testimony of Dr. Blum or appellant himself. What does appear on the record to support the trial court's finding of voluntariness is appellant's own apparent desire to confess freely to someone.

The majority would have required under these circumstances (described as "even more conducive to compulsion that Miranda's," slip op. at 13) that Dr. Blum, who apparently had no inkling that appellant wanted to confess to a murder, advise appellant of his rights. We are unaware of case authority requiring Miranda warnings to be given by a private citizen or a non-law enforcement person. Indeed, this holding by the majority appears to be contrary to the recent en banc decision of this Court in Bowles v. United States, D.C. Cir. No. 21,948, decided November 20, 1970, where the defendant's confession to his mother was admitted into evidence in the absence of Miranda warnings.

Thereafter, on June 12, appellant was to confess to Dr. Owens, the clinical director of the hospital unit in which appellant stayed, after Dr. Blum had advised him it might be best to make a "clean breast" of it. Before the confession,

however, Dr. Owens had called and spoken to an Assistant United States Attorney and had been told to advise appellant of his rights before appellant said anything. Dr. Owens testified that he told appellant everything that the Assistant United States Attorney told him and that he advised appellant before the confession. There was some question whether Dr. Owens told appellant that anything said might be used against him and some dispute as to when appellant was advised, since Dr. Blum testified that the advice concerning rights was given after the confession. The majority concludes, however, that appellant was not only given inadequate advice but that Dr. Owens was mistaken in recollecting that he advised appellant before the confession. As with Dr. Blum, we do not feel it was incumbent upon Dr. Owens, another private citizen, to advise appellant. He did undertake to do so, but without clear basis in this record and majority has chosen to find that the advice was not only inadequate but untimely. These appellate findings appear unnecessary since the majority viewed the confession to Dr. Owens as "but a continuation of what had become compelled self-incrimination by all that had gone before." Slip op. at 15. Therefore, despite the full

warnings and advice given by the policemen a few hours later when appellant confessed to them, the majority finds they were "totally deficient to permit a meaningful exercise of his rights" and "simply the culmination of the process of disclosure of appellant's complicity, which began with the admissions to Officer Preston . . . . " Slip op. at 15. Therefore this confession, the only one to be introduced by the Government even though the trial court found them all voluntary, was also held to be inadmissible.

We do not seek to justify the confession to the police merely by the showing that appellant was fully advised beforehand, but by all the circumstances surrounding appellant's statements which the trial court deemed indicative of appellant's voluntariness. As the dissenting opinion aptly notes,

> The established rule for reviewing confessions under the "totality of circumstances" test is that "where there is a genuine conflict of evidence great reliance must be placed upon the finder of fact." Slip op. at 41 n.19, citing Blackburn v. Alabama, 361 U.S. 199, 208 (1960).

C. The finding of probable cause to arrest appellant after the initial interview is without support in this record.

The majority opinion raises a serious question as to the existence of probable cause and the necessity of taking a

suspect before a committing magistrate. The majority holds that the confessions to Dr. Blum, Dr. Owens, and the police officers were inadmissible for non-compliance with, among other things, Rule 5, F.R. Crim. P., and the decision in Mallory v. United States, 354 U.S. 449 (1957). It reaches this holding by asserting that probable cause for appellant's arrest existed after Sergeant Preston interviewed him and that accordingly he should have been taken without unnecessary delay before a magistrate. The majority, however, is careful to state that in a "strict sense" appellant was "not arrested or detained" as contemplated by Rule 5, but that "he was as though arrested" since he had been transferred to maximum security the day after the interview with Sergeant Preston. Slip op. at 19, 20.

Initially we observe that there was no objection in the District Court to the admission of the confessions on these grounds, nor was it asserted on appeal. As the dissenting opinion notes, "[i]t has long been the rule in this jurisdiction that a claim of denial of Rule 5 (a) procedures must be raised through an objection to the admission of the confession." Slip op. at 35 n.12 (citations omitted).

Secondly, this record makes it clear that appellant's transfer to maximum security was not based on any belief that he was a prime suspect but because of appellant's apparent violation of ground privileges.

Thirdly, there is no indication whatever that the police believed that there was probable cause for appellant's arrest, and in our view there was certainly none. Significantly, there is no basis for concluding that the police officers deliberately delayed arresting and presenting appellant to a magistrate in order to increase opportunities for improper investigation. This record shows merely that the police were conscientiously investigating many people, and on the basis of these early interviews, including the one with appellant, it was felt there was insufficient basis for any arrest at that juncture.

In any event, assuming that appellant was a prime suspect and the police felt there was perhaps probable cause to arrest, there would be no obligation to do so when there was, as here, the greater necessity to continue the investigation. See Hoffa v. United States, 385 U.S. 239 (1966). There was possibly as much basis to arrest other suspects as there was to arrest appellant. The majority opinion in our view would seem to encourage a policy of presenting several suspects before a magistrate. What is worse, it would create an "arrest now, investigate later" practice for law-enforcement officers.

CONCLUSION

The opinion of the majority in this case is at great variance with the facts as adduced at the full hearing in the District Court and is contrary to the decisions of this Court and the Supreme Court. While the setting of this case is somewhat unique, the questions concerning the advisability of giving Miranda warnings during a massive general investigation by police, as well as others, and the determination of probable cause for presentment before a committing magistrate, are fundamental and recurring. The Government respectfully requests that the Court rehear this case and suggest that it would be highly appropriate for such rehearing to be before the Court en banc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition has been mailed to counsel for appellant, David Cobb, Esquire, 1819 H Street, N. W., Washington, D. C. 20006, this 4th day of February 1971.

JULIUS A. JOHNSON
Assistant United States Attorney

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,899

UNITED STATES OF AMERICA, Appellee

v.

THOMAS W. ROBINSON, Appellant

On Appeal from the United States District Court
for the District of Columbia

DAVID COBB

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293-2525

December 1, 1969

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 899

United States of America,

Appellee,

v.

Thomas W. Robinson,

Appellant.

REPLY BRIEF FOR APPELLANT

I.

The Government cited Pea v. United States, 130 U. S. App. D. C. 66, 397 F. 2d 627, 638, rehearing en ban (1968), for overruling Clifton v. United States. Government's brief, p. 17. Mr. Robinson has cited Clifton v. United States, 125 U. S. App. D. C. 257, 371 F. 2d 354 (1966) cert. denied 386 U. S. 995, for two propositions. Robinson's brief, pp. 18 and 19. First, in this jurisdiction the constitutional guarantee against self-incrimination by nonvoluntary confession is afforded by submitting to the jury the question whether a confession is voluntary beyond a reasonable doubt. Second, in this jurisdiction the trial judge may admit a confession

for jury consideration upon making only the qualitative determination, that is that the confession is voluntary, and without making the more demanding and constitutionally required quantitative determination, that is that the confession is voluntary beyond a reasonable doubt.

Pea v. United States, supra, overruled the second of these propositions, not the first. It directed the trial judge to admit a confession only when satisfied beyond a reasonable doubt that the confession is voluntary. It stated that its direction issued "in the exercise of our supervisory power over administration of criminal justice in the District of Columbia." Pea v. United States, 130 U. S. App. D. C. 66, at 76, 397 F. 2d 637, at 637. It did not hold that the quantitative determination of the trial judge is constitutionally required. It did not hold that the quantitative determination of a trial judge without a redetermination by the jury would satisfy the constitutional guarantee against self-incrimination. Instead it reaffirmed the proposition that in this jurisdiction the jury also must be satisfied beyond a reasonable doubt that the confession is voluntary. Clifton v. United States, 125 U. S. App. D. C. 257, concurring opinion at 263, 371 F. 2d 354, at 360 (1966). This Court directed the quantitative determination by the trial judge to afford an added safeguard for the constitutional guarantee, not to substitute for the jury's determination.

The Government argues that Judge Green by implication was satisfied beyond a reasonable doubt that all three confessions are voluntary. Government's brief, p. 17. Mr. Robinson does not deny that such an implication may be drawn from her findings and conclusions. Mr. Robinson is contending that, assuming that Judge Green was satisfied beyond a reasonable doubt, her determination is not supported by the evidence and must be reversed, Mr. Robinson's brief, pp. 8 to 18; and second, her determination, if allowed to stand, is not a constitutionally sufficient substitute for the quantitative determination by the jury. Mr. Robinson's brief, pp. 18 to 23.

It is doubtful that Judge Green at the Robinson trial was cognizant of Pea v. United States, supra. In that decision this Court called for a quantitative determination, which Judge Green did not expressly make, and reaffirmed its expectation that the findings and conclusions of the trial judge will be made in sufficient completeness to reveal his reading of the evidence and his rendering of the law. Judge Green's findings and conclusions are extremely brief and perfunctory. They reveal no thought process other than rejection of all the evidence tending to impeach the voluntary character of the confessions. Tr. 307-308. They do not resolve the few relevant discrepancies in the testimony, which concern when and what warnings were given

Mr. Robinson by Dr. Owens on the morning of June 12, 1967. Mr. Robinson contends that the constitutional guarantee against self-incrimination was not served in his case by the determination of the trial judge so summarily made.

II.

The Government seeks to restrict this Court's application of Miranda to "grilling" in a police dominated atmosphere. Government's brief, p. 18. Mr. Robinson contends that no such limiting barrier has been placed on Miranda. Miranda applies whenever the individual subjected to questioning is in "custody or otherwise deprived of his freedom by the authorities in any significant way". Miranda v. Arizona, 384 U. S. 436, at 478, 86 S. Ct. 1602, at 1630, 16 L. Ed. 2d 694, at 726 (1966); Mathis v. United States, 391 U. S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

III.

The Government's rejection of Mr. Robinson's asserted right to counsel rests in part on a misconception of fact. Government's brief, p. 22. Dr. Schwartz recommended the change in diagnosis from schizophrenic reaction to unstable personality on November 19, 1965. Tr. 516. Thirteen months later, on December 19, 1966, Dr. Schwartz recommended Mr. Robinson's transfer to the Cruvant Building. Tr. 132. The transfer was effected February 7, 1967. Tr. 132. As

of May 30, 1967, there was no current diagnosis of Mr. Robinson's mental condition unless the report of Dr. Blum that Mr. Robinson's condition in late May had become agitated is deemed to be a diagnosis of his mental condition. Tr. 226, 683.

IV.

The Government relies on Joseph S. Robinson v. United States, ____ U. S. App. D. C. ____, No. 22,247, decided October 23, 1969, to defeat Mr. Robinson's contention that use of the usual sanity charge without supplementation grossly prejudiced his insanity defense and constituted plain error. Government's brief, p. 23.

Mr. Robinson's case differs from the Joseph S. Robinson case in at least two significant respects. Mr. Robinson is complaining because Judge Green gave the usual charge that "every person is presumed to be sane" and did not make any exception, qualification or supplementation by reason of his prior acquittal and confinement in St. Elizabeth's. In Joseph S. Robinson the trial judge did supplement the usual language by stating that "with respect to this case, you should also consider the fact that the defendant was committed to St. Elizabeth's * * *". It is precisely because no instruction was given by Judge Green to consider the confinement in St. Elizabeth's "as cutting the other way" that Mr. Robinson is claiming error. Joseph S. Robinson v. United States, supra.

Statement of Chief Judge Bazelon dissenting from denial of rehearing en banc.

Second, Mr. Robinson is contending that the parallel between the offense for which he was earlier acquitted for insanity and his new offense required supplementation of the usual sanity charge. No parallelism between the earlier and later offenses was shown, or urged, in the Joseph S. Robinson case. Joseph S. Robinson was confined to St. Elizabeth's after an acquittal for insanity on a charge of assault. While confined he robbed the Aristo cleaners. The complaining witness testified that Joseph S. Robinson compelled her at gun point to lie on the floor while he took $40 out of the cash register. The Government sought to show that the robbery was not the product of a mental disorder, even if Joseph S. Robinson was suffering from a mental disorder at the time of the crime.

In Mr. Robinson's case, medical testimony from both sides has attributed both Mr. Robinson's earlier and later offenses to his personality disorder. The Government sought to show that this disorder, admittedly related to both offenses, was not a mental disorder. The admitted parallelism between the two offenses, each a mad, crazy, bizarre, irrational attack upon a woman, is in itself evidence of continuation of the disorder. In Mr. Robinson's case, the

prior adjudication that his disorder is mental has a direct and immediate bearing on his criminal responsibility for the later offense. This parallelism between Mr. Robinson's two offenses creates a need to supplement the usual sanity charge not present in the Joseph S. Robinson case.

Mr. Joseph S. Robinson on November 21, 1969, filed a petition for certiorari, United States Supreme Court, Miscellaneous Docket No. 1303. The petition seeks review of the charge to the jury in his case. This Court may wish to postpone its decision until the Supreme Court rules.

Respectfully submitted,

David Cobb
Counsel for Appellant
(Appointed by this Court)

December 1, 1969